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# Who Watches the Watchmen? The Role of the Self-Regulator

*A regulatory system, like Canada's, that delegates powers to self-regulated professions must ensure that competition remains effective and that consumers are well-informed in a transparent and dynamic marketplace.*

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## The Study In Brief

In Canada and around the world governments are granting an increasing number of professionals and other occupations in the service sector the right to self-governance and self-regulation or the delegation of authority that the state would normally hold. Self-regulation has become the preferred method of monitoring professional competence, standard setting, certification and the development of ethical codes of practice for a broad range of traditional professionals such as doctors, lawyers, real estate agents, insurance agents, human resource managers and many more.

There are numerous advantages to self-regulation for professionals or an occupation aspiring towards professional status. The mere fact of self-regulation enhances the credibility and standing of an occupation and its members in the eyes of the public. Rulemaking or rule-enforcing powers grant autonomy and self-determination to professionals, cementing their status within society and providing them with influence over public policy and decision-making. Self-regulation can also assist a group in developing rules that are more responsive to the complex issues within a profession such as the avoidance of conflicts and ensuring that the current needs of clients are being adequately addressed. From the perspective of the state, self-regulation has the advantage of reducing the costs of regulation. The delegation ranges from a complete transfer of rulemaking and rule-enforcing authority from the state to the self-regulator, or through a partial delegation of regulatory powers, with the government able to provide some oversight. Self-regulation can be a smarter solution when a state-organized regulator lacks the financial means or political willpower to regulate in the best interests of the public and at the lowest cost possible.

While the advantages of self-regulation are generally understood by governments and the professions, the downside of this form of regulation is less understood and often complicated by the nature of the interests at play. In this *Commentary*, I examine the role of self-regulators in Canada and some of the issues that can arise when self-regulating organizations take on policy and other decision-making roles traditionally held by governments. This *Commentary* explores examples of various policy decisions and actions taken by self-regulated organizations that have had or could have an impact on private businesses and the quality of service and representation afforded to the public generally and clients of professional services specifically.

I recommend that governments tighten the procedural and substantive rules that affect the operation and scope of powers of self-regulatory and other organizations delegated authority by legislation.

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**Laws that grant statutory powers to a profession or occupation must be carefully drafted and scrutinized to ensure that the public interest is adequately protected in cases where regulatory powers are delegated to private actors. A regulatory system that focuses on delegation of powers to self-regulated bodies must ensure that competition remains effective and that consumers are well-informed in a transparent and dynamic marketplace.**

> "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."
> Adam Smith – *The Wealth of Nations* (1776)

If regulators "regulate" and delegators "delegate" how do we regulate that which has been delegated? Lawmakers encounter this dilemma with Self-Regulated Organizations (SROs), which are increasingly being used as governance vehicles for the professions, occupations, industry and trade associations. A recent study by the C.D. Howe Institute illustrates the growing importance of private regulation on the international stage with frameworks for governing international economic transactions increasingly being maintained by the private sector (Herman 2012). On a national level, private regulation and standard-setting is increasingly embodied by the SRO, a form of regulation that has become standard for occupations as diverse as investment dealers and human resource professionals.[1]

Self-regulation is defined as an arrangement involving procedures, rules and norms that constrain the conduct of private actors, when the actors themselves develop the rules rather than the state (see Porter and Ronit 2006). States grant SROs statutory authority to regulate the conduct of their members, with the general proviso that SROs must exercise their authority in a manner that advances public-interest objectives.[2] Governments favour self-regulation or delegation of authority for the professions (including law, medicine, insurance, real estate and investment advisors, among others) because they shift responsibility for rulemaking and enforcement to the groups that engage with the public in their capacities as professionals. Such delegation is advantageous from a management

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1 On November 6, 2013, the Ontario Legislature enacted Bill 32: *The Registered Human Resource Professionals Act*, intended to replace the former *Human Resources Professionals Association of Ontario Act, 1990*. This legislation is designed to enhance the self-regulatory powers of the human resources profession in Ontario.

2 For example, see the definition of a Self-Regulatory Organization as defined by the British Columbia Securities Commission: http://www.bcsc.bc.ca/sros.asp.

and standard-setting perspective as it can reduce inefficiencies associated with third-party regulation, and provide autonomy for professionals, allowing them to enhance their credibility and legitimacy in the eyes of the public.

As a system of regulating the conduct of private actors, self-regulation has the potential to mitigate some key disadvantages associated with state or third-party regulation.

First, self-regulation empowers the actors who are members of a profession or occupation and thereby reduces some of the costs associated with state-driven third-party regulation. In other words, SROs can reduce inefficiencies that occur when the cost of effective regulatory monitoring is high, leaving politicians with only weak incentives to evaluate the efficiency and effectiveness of regulations and regulatory agencies.[3]

Second, the problem of information costs limits a government's regulatory effectiveness since it is usually too costly for the state regulator to obtain complete information on all matters it seeks to regulate and regulatees are generally in a better position to access the information needed to make regulatory decisions. Information costs and principal-agent problems are endemic in government regulation and open the door to self-regulation as an alternative to third-party regulation of professionals or occupations. Reports on industry and self-regulation support this view, including a 2000 Australian study which found that industry self-regulation is often more flexible and less costly for businesses and consumers than direct government involvement.[4]

The advantages of SRO regimes can also be their key weaknesses, and the evaluation of a regime depends on the statutory rules governing its inception, growth and development. For example, a longstanding concern with state regulation is the view that well-situated lobby groups capture regulatory powers in service of their own agendas (Stigler 1971). While SRO regimes can reduce the information costs associated with government regulation, the downside of delegating broad regulatory powers to SROs is that such delegation may not always produce regulation that serves public interest objectives. In particular, the rules developed by SROs may represent the interests of current members at the expense of potential and future members, since self-regulators derive a sizable portion of their support from current members and can be driven more by the immediate interests of such members instead of the broader interests of the public.

An SRO regime can therefore potentially misallocate resources, causing unemployment in the short run and slowing economic growth in the long run. SROs can be especially of concern for currently trained professionals who experience difficulty entering a profession laden with barriers to entry. At its worst, delegation of legislative power to a professional or occupational association disproportionately increases the economic power of these organizations and can lead to their entrenchment as monopolies that restrict competition.

This *Commentary* considers the need to review and put appropriate constraints on SROs, as these organizations have an impact on affordability for consumers and economic competitiveness in the Canadian economy. Provincial governments in particular must be careful not to grant self-regulatory powers without some constraints against self-interested and anti-competitive behaviour.

3 For a discussion, see Green and Hrab (2003).

4 See Commonwealth of Australia. 2000. *Industry self-regulation in consumer markets: Report prepared by the Taskforce on Industry Self-regulation.* Accessed at http://archive.treasury.gov.au/documents/1131/PDF/final_report.pdf

Lawmakers and courts also need to be wary of the distorting effects of legal principles that render a number of regulated and self-regulated sectors of the Canadian economy immune to competition laws.

I recommend that governments structure legislative and administrative frameworks of self-regulatory regimes to protect the public interest in competition and limit abuses of power. I also consider the legal principles that governments and regulators can use to interpret legislation in support of these objectives, such as drafting laws in a manner that is minimally restraining to competition and increasing the emphasis on the fiduciary obligations of certain SROs that have broad discretionary powers.

Canadian governments can further enhance oversight by consulting with the Competition Bureau and consumer advocacy groups when administering or surveying self-regulatory powers. In this *Commentary*, I will make specific proposals for reform, with reference to issues that arise in areas where self-regulation or delegation of statutory authority has resulted in different regulatory concerns: insurance brokers, real estate agents and professional trade associations.

## A Framework for Effective Self-Regulation

While there is no single "best practice" model for effective self-regulation, past reviews have provided some insight on SRO features that can improve market outcomes for consumers and generally assist in advancing a framework of self-regulation that is consistent with the public interest. I divide these recommendations into procedural aspects, which relate to the general mechanics of rulemaking; and substantive aspects, which provide an outline for the content of rules aimed at protecting the public interest. Although I focus on Ontario examples here, many of the same principles apply to other provinces in Canada.

### Procedural Aspects

- Consultation: Effective consultation with industry, consumers and governments ensures that SRO legislation properly addresses public-interest objectives. The Competition Bureau and consumer advocacy groups can assist in raising key issues associated with self-regulation, including fair market practices, barriers to entry, transparency and effective competition;
- Education and Publicity: Self-regulatory schemes need to have clear administrative rules that are made easily identifiable by consumers so that the general public can have a better appreciation of the nature of these regimes and an awareness of how to register complaints and provide consumer input;
- Transparency: SRO regimes should have rulemaking that is transparent, with the decisions made by SROs verifiable and open to challenge;
- Monitoring and Accountability: Studies on SROs have consistently found that some government oversight into the activities of these organizations is helpful in ensuring accountability. Tools such as annual reporting, review of SRO legislation by governments, and regulatory audits by consumer advocacy groups can provide effective monitoring and ensure that such organizations remain accountable to the public and continue to promote public-interest objectives. Many SROs already have such reporting requirements but do not have metrics in place to ensure the protection of the public interest, and more specifically, consumer interests.

### Substantive Aspects

- Public Interest: The core substantive concern with self-regulation is the degree and extent to which SROs serve public-interest objectives; e.g., by correcting a market failure such as asymmetric information, servicing the need for an independent body of professionals, or maintaining standards within highly specialized or technical fields. Clear rules should ensure that those who exercise public authority, either directly or indirectly, provide an account of their conduct and a justification of the rules they develop.

- Accountability and Transparency: SROs must be accountable to their members and the public more generally. Transparency rules should ensure that third parties and/or the public may scrutinize the conduct and the decisions made by SROs. The rules should ensure that "authority delegated to an organized profession does not displace the public accountability of the state for the way in which a profession is governed" (Aucoin 1978, p.10).
- Reasonable and Economically Justifiable Restrictions: Where an SRO places restrictions on entry, mandates certification or educational requirements, or otherwise imposes barriers to participation, such restrictions should rationally relate to a public-interest objective and be reasonable in light of the regulatory goal(s).
- Minimally Restrictive Regulation: Where possible, the regulatory rules governing SROs should be designed so as to be least restraining to competition, meaning that regulations must not be developed or applied in ways that are more trade-restrictive than necessary to fulfill legitimate public-policy objectives.
- Review of the Regulated Conduct Doctrine: In Canada, and most Organisation for Economic Co-operation and Development (OECD) countries, general framework laws are in place to safeguard competition and prohibit anti-competitive practices. However, in cases where provincial or state laws conflict with competition law, a doctrine generally known in Canada as the "regulated conduct defence" permits local or regional laws to maintain anti-competitive practices notwithstanding their conflict with competition law. As discussed in this *Commentary*, there are compelling reasons for lawmakers and the courts to review the regulated conduct defence, especially given the increasing influence of SROs that are being established, and to a certain extent protected, under provincial laws.

## A Primer on SROs in Canada

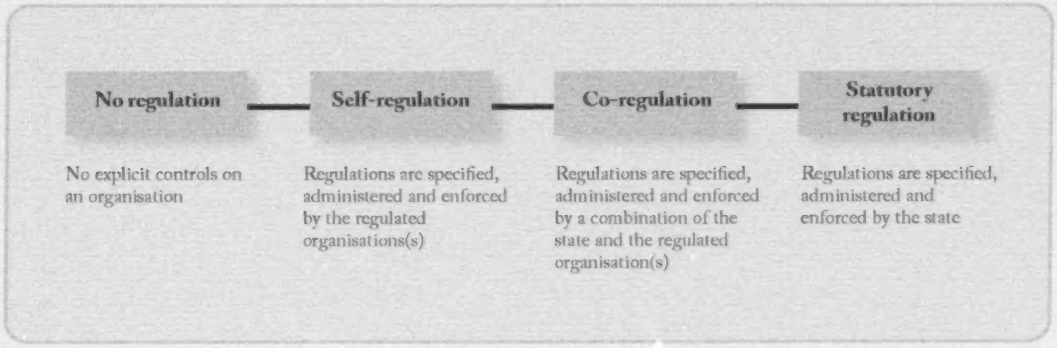
There are different types of SROs that have varying degrees of power and influence over public policy. These different regimes usually fit within a spectrum between a completely unregulated system and the traditional, state-administered, operated and monitored regulatory regime. Figure 1, reproduced from a study of self-regulation by Bartle and Vass (2005), describes the regulatory spectrum and the presence of self-regulation along the spectrum.

The five principal models of self-regulation applicable to professional and occupational industries include voluntary codes of conduct, statutory self-regulation, firm-defined regulation, supervised self-regulation and regulatory self-management (Priest 1998, pp. 233-302). While the degree of authority, oversight, discretion and independence varies among these different models, this *Commentary* will provide a review of the regulatory issues facing different types of SROs, including:

- Classical SROs: organizations that are created by legislation and operate independently; e.g., the provincial law societies or the medical profession; and
- Delegated Authority SROs: organizations that have the power to regulate in place of the government but whose rulemaking and/or rule-enforcing authority derives from legislation that involves some degree of co-regulation with government through an administrative agreement or similar legal instrument. This is a form of regulatory outsourcing, often straddling the boundary between self- and co-regulation as described in Figure 1.

In the discussion of organizations that follows, I apply the SRO label not as a legal definition of the relationship between a profession, occupation or other body and the public, but rather as a practical or functional way of describing the relationship between groups that have obtained some degree of autonomous rulemaking or rule-enforcing capability. There are obvious differences among organizations that delegate authority to administer an act versus organizations constituted and conducting their operations under an act. This *Commentary* considers both true self-regulators, (organizations constituted under statute) and

Figure 1: The Spectrum of SROs


No regulation
Self-regulation
Co-regulation
Statutory regulation
No explicit controls on an organisation
Regulations are specified, administered and enforced by the regulated organisations(s)
Regulations are specified, administered and enforced by a combination of the state and the regulated organisation(s)
Regulations are specified, administered and enforced by the state

Source: Bartle and Vass (2005).

various forms of delegated administrative authorities whose role is limited to administration on behalf of the government. Each form of SRO can have restrictive effects on competition.

Table 1 provides a description of the different types of SRO regimes, their administrative frameworks, and examples of organizations or programs.

The unique challenges of SROs are visible in the increased size and relative importance of these organizations during the rise of the Canadian welfare state in the post-WWII era. Before the Confederation of Canada, there were only three self-regulated professions in Ontario: lawyers, doctors and land surveyors.[5] Currently, in Ontario, the government has delegated administrative or quasi-judicial functions to more than 80 bodies, and over 300 organizations in the province exercise powers under statute.[6] There are approximately 40 professional SROs that are delegated authority to engage in a particular practice, use a professional designation and protect the public interest.[7] More than half of these SROs are in healthcare or related fields.

Most professions are longstanding, publicly recognized occupational fields that include designations such as chartered accounting, law, medicine, etc. Lesser-known SROs have members engaged in a particular business but not necessarily organized under a common education, certification or philosophy of practice. For example, investment dealers, insurance brokers and real estate agents all

5 See "Table 1" in Adams (2009).

6 Organizations delegated with statutory authority include institutions as diverse as the Art Gallery of Ontario, the Liquor Control Board of Ontario and various hospitals and universities.

7 See Ontario's Regulators for Access Consortium. 2014. "Ontario's Regulated Professions." Accessed at http://www.regulatorsforaccess.ca/resources/regontario.aspx

have varying degrees of autonomy in the form of self-regulation or delegated statutory authority.[8]

In Ontario, the *Safety and Consumer Statutes Administration Act* (SCSAA) provides delegated authority to real estate agents, travel agents and wholesalers, motor vehicle dealers and cemetery operators.[9] The SCSAA is an example of a legal structure governing delegation of powers and duties under statute to private-sector organizations. More recently, in 2012 the Ontario government enacted the *Delegated Administrative Authorities Act*, 2012 (DAAA)[10] which has the stated purpose of "provid[ing] for the efficient and effective delivery of delegated government programs and services by independent not-for-profit corporations."[11]

Whereas the SCSAA allows for delegation of powers under designated acts, the DAAA, on the date of its official proclamation, will be more comprehensive in that it will allow the Province of Ontario to delegate the administration of specified provisions of any act and prescribe corporations as delegated administrative authorities to administer delegated legislation.[12] As discussed in more detail below, the delegation of statutory powers can lead to unwanted outcomes, including the transfer of market power to a concentrated industry group at the potential expense of consumers and private businesses.

## RATIONALES FOR REGULATION

Most proponents of *laissez-faire* systems view economic regulation as a mechanism that interferes with or outright blocks the incentive structures underlying free market efficiencies. They are often proponents of the view that "institutions are not necessarily or even usually created to be socially efficient; rather they, or at least formal rules, are created to serve the interests of those with the bargaining power to devise new rules" (North 1990).

Where markets function well, unfettered competition is the preferred mechanism for resource allocation. However, even the most ardent proponents of economic liberalism concede that some regulatory framework must exist to channel market activity or to correct market failures.[13] In the case of professions or specialized trades, there is evidence that market failures exist due to the information imbalance between consumers of services (whose knowledge is limited) and the professionals or specialized tradespeople offering the services (whose knowledge is extensive).[14]

8 Investment Industry Regulatory Organization of Canada (IIROC) is a national self-regulatory organization that sets and enforces market integrity rules regarding trading activity in Canadian equity marketplaces; Registered Insurance Brokers of Ontario (RIBO) is a self-governing, self-supporting organization of general insurance brokers in Ontario; Real Estate Council of Ontario (RECO) is a non-profit corporation delegated authority to administer the *Real Estate Business Brokers Act*, which is the statutory framework that governs fair practices in the market for real estate services.

9 See "Schedule" in the *Safety and Consumer Statutes Administration Act*, S.O. 1996, c. 19.

10 This act is not yet in force. It comes into effect on a day to be named by proclamation of the Lieutenant Governor. See *Delegated Administrative Authorities Act*, S.O., 2012, c. 8, Schedule 11 (DAAA).

11 *Ibid* s. 1.

12 DAAA.

13 See, for example, Milton Friedman (1962).

14 The asymmetric information problem is also known as the lemons problem, a reference to economist George Akerlof's 1970 paper "The Market for Lemons: Quality Uncertainty and the Market Mechanism" in which he outlines the concept of information asymmetry as it applies to the market for defective used cars. See Competition Bureau. 2007. "Self-Regulated Professions: Balancing Competition and Regulation." (Self-Regulated Professions). Accessed at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions-study-final-E.pdf/$FILE/Professions-study-final-E.pdf

## Table 1: Types of SROs and Their Attributes

| Type of SRO | Key Features | Statutory Regime | Canadian Examples |
|---|---|---|---|
| **Voluntary Codes of Conduct** | • Established through contract or as a matter of policy among members of an industry or professional organization.<br>• May involve third party oversight.<br>• Often accused of being cosmetic rather than substantive.<br>• Voluntary codes can apply to a single store or company, several firms or organizations, an entire sector or many sectors.<br>• Codes can be national or international in scope. | • No statutory regime; voluntary and/or private enforcement based on contract, policy or other written agreement. | • Gap Clothing chain sourcing code pertaining to labour related standards.<br>• Standards established by the Canadian Marketing Association.<br>• The Responsible Care Program developed by the Chemistry Industry Association of Canada.<br>• Code of Practice for Consumer Debit Card Services developed by the Canadian Bankers Association.<br>• Voluntary privacy codes are used in a number of large organizations. |
| **Statutory Self-Regulation** | • Government establishes a regulatory structure through legislation.<br>• Power delegated to a representative board, society, etc. with the inclusion of certain discretionary powers. For example, the Law Society of Upper Canada is tasked with carrying out various functions, duties and powers in a manner that "protect[s] the public interest."<br>• Membership is usually compulsory for attaining professional status or engaging in a particular practice. Licensure regime can impose limitations by client, activity or relationship (Priest 1998, p. 244).<br>• Members are typically certified and often subject to discipline for noncompliance with rules. | • Legislation creates an organization that is empowered to license, oversee and regulate the conduct of its members without much (if any) government interference. Government control is limited to how the statutory regime is structured when first enacted. | • *Law Society Act* is the regulatory structure governing lawyers in Ontario with similar legislation used in other provinces.<br>• College of Physicians and Surgeons of Ontario regulates the practice of medicine in Ontario.<br>• The *Chartered Accountants Act, 2010* empowers the Institute of Chartered Accountants of Ontario. |

Table 1: continued

| Type of SRO | Key Features | Statutory Regime | Canadian Examples |
|---|---|---|---|
| **Firm-Defined Regulation** | • Government establishes a regulatory structure that covers an industry, with specific rules that cover a firm or a smaller industry group.<br>• Statutory regime provides rules, divides responsibility and establishes an organizational structure for a firm, similar to articles of incorporation for a private company. | • Legislation is specific to an industry, group within an industry or a specific firm. | • *Air Canada Public Participation Act, VIA Rail Canada Act*, Part IV of Ontario's *Electricity Act* provides a regulatory structure for Hydro One. |
| **Supervised Self-Regulation** | • Government develops an oversight body and the self-regulatory structure by legislation.<br>• SROs govern their members and set rules that are approved by the supervising agency.<br>• A regulator approves rules that are instituted, receives and reviews critical information that is filed. | • Statute delegates authority to the SRO but ultimate responsibility rests with an agency of the government. | • The Ontario College of Trades regulates and promotes the skilled trades, ensuring proper training and certification; however the Minister of Training, Colleges and Universities retains final decision making authority.<br>• The Ontario Securities Commission recognizes and supervises the Investment Industry Regulatory Organization of Canada ("IIROC") and the Mutual Fund Dealers Association of Canada. |
| **Regulatory Self-Management** | • Government sets regulatory policy and rules through legislation, self-managed organization is responsible for operational delivery of the program or implementation of the rules.<br>• The government remains in charge of rulemaking and policy-making, maintaining the ability to enforce compliance.<br>• Arrangements made between government and the SRO are contractual and cover a variety of items such as liability of administrative authority, insurance, access to government assets, etc. | • The *Safety and Consumer Statutes Administration Act* is an example of Ontario legislation that has allowed the government to delegate certain functions while maintaining responsibility for standard setting and defining policy. In 2012 the Ontario government enacted the *Delegated Administrative Authorities Act*, 2012 which is more generic delegatory legislation. | • The Real Estate Council of Ontario (RECO) is delegated authority to administer the *Real Estate Business Brokers Act* under the *Safety and Consumer Statutes Administration Act*. Final authority rests with the Ministry of Consumer Services which has delegated its powers pursuant to an Administrative Agreement with RECO. |

Source: Author's compilation, Priest (1998).

In the field of medicine or law there is a power imbalance between a doctor and her patient or a lawyer and his client due to the specialized information and judgment calls known to the professional and sought by the consumer. The existence of asymmetric information in the market for professional services, therefore, is due to the nature of the services exchanged in these markets.

Most consumers are able to make informed decisions about everyday goods and services, the characteristics of which are visible upon inspection or through experience. They cannot know with certainty, however, whether they are receiving good legal advice, have sufficient insurance protection, or are infected with a certain illness, without the advice of a professional upon whose judgment they must rely.[15]

Although consumers become more knowledgeable about their dealings with professional advisors through experience, the sheer volume of information that is required before a typical consumer can make an informed choice in a complex field is such that self-education becomes excessively costly and therefore impracticable. Although technology has empowered consumers and permitted them to have more direct access to information, the manner in which information is organized and presented on the Internet does not always favour consumer interests and can often result in further confusion.

The presence of externalities is another strong rationale for regulatory intervention. The classic example of a negative externality is the case of environmental pollution, which is not typically factored into a commercial transaction and therefore represents a spillover cost of economic activity. Positive externalities are also common; for example, vaccinations assist in not only immunizing the subject patient but also in helping others benefit from an environment with a lower incidence of infection and therefore less likelihood for transmission of illnesses. Regulation in the space of professional services ensures that professionals and specialized occupations are well trained and therefore assists in preventing acts of professional negligence (such as building collapses, disease outbreaks, etc.).

The existence of asymmetric information, externalities and public goods provides a rationale for regulating professionals and specialized occupations whether by government or by one form of self-regulation. A key advantage of self-regulation is that it creates an arm's length relationship with the state, providing the SRO with a layer of insulation from more transitory political imperatives that can negatively influence regulatory decision-making.

Self-regulation mostly consists of rules pertaining to education, training and certification designed to ensure the competency of professionals and to protect the public against misleading information and fraud. However, granting a profession self-regulated status goes beyond mere certification as it allows the organization to not only set standards of admission and competence but also to control how it interacts with and protects the public. In short, an SRO that has broadly delegated powers under statute becomes an independent, quasi-political entity. In this way, SROs are often able to develop a regulatory agenda that influences the development of policy and law.

The design of regulation in the professional services space should not ignore the importance of maintaining competition that encourages lower prices, better service offerings and long-term innovation. In the context of professional services regulation, competition is generally defined in

15 *Ibid.* See also Priest (1998, p. 253).

the negative sense; i.e., rules that do not place restrictions on entry, mobility, advertising, pricing, and business structure are preferred to rules that are unduly restrictive, unnecessarily complex or bureaucratic.[16] Because professional services focus on the exchange of information products, a key metric of competitiveness is the extent to which regulatory rules do not stifle innovation in the delivery of services. Effective rules therefore ensure competency and fairness in the delivery of professional services with the least restriction possible to fair competition and differentiation among professionals.

## Accountability and the Public Interest

Since one of the central rationales for regulating professional services is to limit the asymmetry existing between consumers and professionals, there is a high degree of public trust placed in the statutory regimes governing SROs. The public has a legitimate interest in seeing that SROs are bound by rules ensuring that (i) they operate primarily in service of the public interest, and (ii) they are subject to a high level of public accountability. Terms such as "public interest" and "public accountability" are ambiguous and evolving concepts, particularly as they relate to SROs.[17] That said, in view of the definition of SROs provided in this *Commentary*, the following are observations on the public-interest role they ought to play and how (and to whom) they should be accountable.

There is an important nexus of trust and confidence between licensed, self-regulated professionals and the consumer or client, who relies on the professionals for their knowledge and expertise. Examples include the lawyer advising their client to execute a contract or the doctor recommending a specific diet to their patient. In these situations, the professional is acting as an agent for the client (Priest 1998, p. 254). The importance of trust in maintaining fairness and balance in this relationship gives rise to a fiduciary obligation, meaning that the professional should "operate with a high degree of disinterestedness and maintain the primacy of the client's welfare" (*ibid.*). While fiduciary obligations do not, and arguably should not, apply to all SROs, they do apply to many professionals and therefore are relevant considerations in circumstances where:

(1) The fiduciary has scope for the exercise of some discretion or power;

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interest;

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[18]

The agency relationship between certain professionals and their clients is not the only fiduciary relationship relevant in the context of self-regulation. There is a double-agency relationship for many SROs and governments which arises by

16 See the Competition Bureau's discussion of restrictions in the professional services sector in Self-Regulated Professions.

17 For example, Tracey L. Adams found that for much of their history, professionals' interests were viewed as not being incompatible with the "public interest"; however, the perception since the 1960s has been that professional groups are increasingly being rejected in discussions of the public interest, in favour of consumer and business groups. See Adams (2013).

18 *Frame v. Smith*, [1987] 2 S.C.R. 99 and *Hodgkinson v. Simms* [1994] 3 S.C.R. 377 at para 119.

virtue of the "delegation of authority by the state to an organized profession which creates an agency relationship between the state and the profession."[19] Therefore "public interest," at least with respect to SROs, is the fiduciary obligation that arises when power or discretion is exercised pursuant to a mandate under statute.

In a long line of Supreme Court cases examining the authority and discretion of public decision-makers, the oft-cited principle is that "[d]iscretion necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption."[20] Therefore in view of the double agency relationship of SROs to the public and government, "public interest" in this context means the good faith exercise of discretion that is in accord with the purpose and objectives of legislation and that adheres to very high standards of ethical conduct, consistent with those applicable to fiduciaries.

The protection of the public interest requires a faithful discharge of statutory duties and proper exercise of discretion in the administration of legislation and the concept of "public accountability" is a necessary corollary to this concept. To be accountable, an SRO must show that it is discharging its duties to the public ('public' in this context meaning consumers of specialized or professional services). Moreover, the discretion that an SRO exercises (particularly with respect to the rules that it develops and the accreditation system that it enforces) must be shown to be necessary and justifiable to protect the public interest. At a minimum, such accountability entails a level of transparency in the SROs decision-making process and some avenue for public participation in the setting and enforcement of the regulatory agenda.[21]

## Competition, Public Interest and Self-Regulation

As noted earlier, the core concern with SROs is not the fact that they are delegated statutory powers normally reserved for publicly elected officials. Such delegation can be beneficial if it reduces costs associated with gathering information necessary to regulate effectively and/or avoids the problem of properly motivating the regulator to act in the interest of the regulated members of the SRO.

The chief concern with SROs is that the incentive structure driving the development and political empowerment of these organizations can lead their members to develop rules that promote their own economic interests, often at the expense of public-interest objectives. This is a particular risk with professional licensing regimes that can disrupt competition through barriers to entry and limitations on forms of practice. Studies have found that licensing regimes can stifle competition and innovation, resulting in:

> [h]igher prices, less efficient use of resources, discouragement of new developments and a tendency toward rigidity in the structure and trading methods of those businesses. Such collective restrictions tend to reduce the pressures upon those observing them to increase their efficiency. They may

19 Report of the Professional Organizations Committee, (Ontario: Ministry of the Attorney General, 1980) at 16. See also: Peter Aucoin. *Public Accountability in the Governing of Professions: A Report on the Self-Governing Professions of Accounting, Architecture, Engineering and Law in Ontario* (1978) at p. 8.

20 See *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

21 In Priest's view, accountability means that players in the regulatory system are held responsible for their actions and decisions. See Priest (1998) at p. 275.

> also delay the introduction of new forms of service and elimination of inefficient practitioners.[22]

The impact on competition is of particular concern in Canada, which has experienced more than a decade of below-average labour productivity, with particularly sluggish innovation in the professional services sector. The Competition Bureau found that labour productivity in the professional sector is approximately half that of the same sector in the United States and that Canadian professions are in the bottom quintile of labour productivity among Canadian sectors.[23] Below are some examples of competition-related issues that can arise with different types of SROs.

### Continuing Education for Real Estate Brokers

Self-regulated organizations face a number of important business decisions, such as how to deliver proper training or certification and maintain standards of competency and ethics among their members who are both professionals and business persons seeking to make a reasonable return. To be sure, this is not an easy task; maintaining reasonable profitability, ensuring client satisfaction and a commitment to the profession can be a difficult balance to strike. SROs therefore rarely make decisions with only one interest in mind, and are driven by a multitude of considerations factoring into each business judgment. That said, certain decisions can implicitly be driven by influences that have a more powerful voice than the broader, albeit less represented, voice of the public interest.

The Real Estate Council of Ontario (RECO) is a non-profit corporation delegated authority to administer the *Real Estate Business Brokers Act, 2002*, which is the statutory framework governing fair practices in the market for real estate services. Established in 1997, RECO was delegated administrative authority under the *Safety and Consumer Statutes Administration Act* and plays a pivotal role in enforcing mandatory continuing education for real estate brokers.

Recent continuing education policies introduced by RECO raise interesting questions about the role SROs play in crafting policy that has tangible effects on business and competition in the private sector. In 2013, RECO instituted a mandatory continuing education policy that is delivered over the Internet.[24] The decision has the effect of moving training and accreditation services away from third parties in favour of online delivery with fees paid directly to RECO. The direct consequence of RECO's decision to take continuing education in-house is the loss of business to third-party suppliers. On the other hand, RECO's decision has lowered the cost of continuing education and can be viewed as a method of streamlining or standardizing education on consumer protection, regulatory matters and industry issues based on a standard curriculum delivered online.

While the decision can be viewed as cost-saving to RECO members (who pay lower fees), the impact on business illustrates the general theme of this *Commentary* that policy decisions of SROs can and often do have substantial economic effects on the private sector. Whether the decision is made by a truly independent SRO or one delegated statutory authority and thus acting as agent of the government, there is an entire sphere of commercial

22 United Kingdom, Monopolies Commission, Part I: The Report (1970), quoted in Manitoba Law Reform Commission (1994). The Commission recommended against certification and licensing unless its benefits exceed its costs and noted that "[b]ecause of its substantial costs, licensing should be used sparingly and cautiously."

23 Competition Bureau, "Self-Regulated Professions: Balancing Competition and Regulation 2007."

24 See "RECO's New Mandatory Continuing Education Program." Accessed at http://www.reco.on.ca/education.html.

activity in Canada that is impacted by regulatory decision-making. The key question raised by this example is whether the rules establishing an SRO and granting it the ability to make decisions that impact private business, contain a clear process ensuring that policy decisions are effectively weighted toward the public interest.

### Insurance Brokers, Self-Regulation and Client Interests

Consumers have an interest in obtaining insurance that is tailored to their budgets, tolerance for risk, security and other individualized factors. Insurance agents have an interest in selling insurance. In a perfectly competitive market, the competing incentives of buyers and sellers of insurance packages result in the efficient delivery of insurance. There are, however, a number of difficulties with insurance markets that can be exacerbated by weak self-regulation or regulatory rules that fail to prevent the self-interest of brokers steering them towards anti-competitive or other practices that diverge from the best interests of their clients.

In 2004, the Canadian Council of Insurance Regulators (CCIR) created an Industry Practices Review Committee (IPRC) that was tasked with reviewing the relationship between insurers, brokers, agents and their clients.[25] In its survey of the insurance industry, the IPRC found that a number of relationships and business practices in this market have the potential to create conflicts of interest unless they are well managed.[26] In particular, the IPRC found that many of the survey respondents expressed concern with the lack of transparency and potential for conflict arising from commissions and other performance-linked benefits.[27]

The IPRC survey revealed many concerns with the issue of broker independence, with one respondent suggesting that the implementation of the *Registered Insurance Brokers Act* in 1981 (which created the Registered Insurance Brokers of Ontario, or RIBO, the self-regulatory body for Ontario insurance brokers) has created an environment where there are no truly "independent" agents in the property and casualty insurance marketplace in Ontario.[28] A paramount concern noted in the IPRC survey was the issue of disclosure. Exclusion of information has been found to be one of the concerns with self-regulation, where SROs or professional trade associations protect and/or withhold crucial information such as stock data, real estate listings or, in the case of insurers, commissions and fee information, from consumers. In many cases, the self-regulatory structures tacitly support such transparency gaps by failing to produce more vigorous codes of conduct that ensure effective competition and maintain the primacy of client interests.

### Regulated Conduct and the Professions

From the perspective of those being regulated, a key advantage with self-regulation is that regulatees gain autonomy and a degree of independence

25 See Summary of Responses on the Consultation Paper on Relationships Between Insurers and Sales Intermediaries-Achieving Best Practices, Industry Practices Review Committee of the Canadian Council of Insurance Regulators. 2005.

26 *Ibid.* at p. 1.

27 *Ibid.* at p. 4.

28 *Ibid.* at p. 6.

through the process of self-governance. Along with this increase in autonomy and independence, a profession or occupation obtains economic powers – the right to make and enforce rules, license, discipline and enforce standards. One of the inherent difficulties with this form of empowerment is that it is not always limited to mere self-regulation for the enforcement of standards.

An issue with self-regulated professions or occupations is the tendency for these groups to coalesce and form organizational offshoots such as trade associations. Although trade associations can be helpful in assisting professionals to network, exchange useful information and know-how, they can also lead to collusive or anti-competitive conduct in the form of fixing prices, allocating markets or otherwise restraining competition in a manner that is prohibited by the *Competition Act*.

Since the economies of many professionals' practices are based, at least in part, on commodity tasks (such as drafting a simple will for lawyers or conducting a routine physical exam for doctors) there is a strong incentive to establish, and rely on, mandatory fee schedules that ensure consistent returns and limit the uncertainties associated with price competition. Many professionals, however, are unaware that minimum fees or tariff schedules are *per se* illegal under Canada's *Competition Act*, which prohibits fixing, maintaining, increasing or controlling the price for the supply of a product.[29]

In Canada, several cases involving professional associations imposing minimum tariff schedules have appeared before the courts. For example, in *Mortimer v. Corp. of Land Surveyors of the Province of British Columbia*, the British Columbia Corporation of Land Surveyors, suspended, and fined a member Land Surveyor for offering to provide professional services for a fee less than that prescribed in the Corporation's minimum tariff schedule.[30] Although the land surveyor in this case successfully challenged the minimum tariff schedule on the grounds that it violated the *Competition Act*, the case demonstrates how easily an association of professionals can create and enforce rules that restrict competition.[31] It also illustrates how professional associations can oppress members who do not subscribe to the prevailing economic philosophy and who pioneer alternative service offerings (either on price, quality or method of delivery).

Similar cases to *Mortimer* were the subject of court proceedings in Ontario, where competition authorities challenged the mandatory fee schedules of associations of lawyers in Kent and Waterloo counties (see Packowsi 1988). In the *Kent Law Association* case, the Ontario Supreme Court (as it then was) imposed an Order against the lawyers association prohibiting the adoption of fee schedules, enforcing fixed fees or exchanging fee information other than as necessary for the normal practice of law (*ibid.*). These cases highlight the fact that SRO members have an incentive to enter into agreements or enact policies that serve their own economic interests at the expense of the public interest and that trade associations are used frequently as the conduit for such actions.

## Self-Regulation and Regulated Conduct

As explained in the previous section, one of the concerns with self-regulated professionals and

29 See Section 45(1) of *Competition Act* R.S.C., 1985. C. C-34. Accessed at http://www.laws.justice.gc.ca/PDF/C-34.pdf

30 See *Mortimer v. Corp. of Land Surveyors of the Province of British Columbia* [1989] B.C.J. No. 487.

31 A classic case on trade associations and price-fixing was an investigation into alleged price fixing in the pharmacy sector in *R. v. Nova Scotia Pharmaceutical Society* [1993] N.S.J. No. 105.

trade associations is that the initial monopoly of self-regulation can expand into an association of like-regulated, like-minded professionals whose economic and commercial interactions become increasingly governed by norms of self-regulated solidarity as opposed to competitive forces.

In Canada, the issue of competition, self-regulation and professional associations is a recurring one that has been litigated in several cases before the Supreme Court. In the late 1970s, the insurance industry was targeted under what was then known as the *Combines Investigation Act*, the predecessor to the current *Competition Act*.[32] In the controversial case of *R. v. Aetna Insurance Co.* the appellants were members of the Nova Scotia Board of Underwriters and had been setting their fire insurance rates in accordance with the rates set by the Board. They were charged with conspiracy to prevent or lessen unduly competition in the price of fire insurance under the anti-combines law. The argument of the underwriters was that their tariff fees were not intended to unduly lessen competition and therefore were not illegal. They were acquitted at trial but the Court of Appeal sided with the Crown and convicted the Board. A majority at the Supreme Court upheld the trial judge's acquittal of the insurers on the basis that their adherence to a rate schedule did not "unduly" prevent or lessen competition.[33]

Although the *Aetna* case is more than 30 years old, the principles of interpretation employed by the majority of the Supreme Court continue in judicial application through a legal principle known as the regulated conduct doctrine (RCD) – a doctrine of interpretation which essentially states that "a person obeying a valid provincial statute may, in certain circumstances, be exempted from the provisions of a valid federal statute" so long as there is "a direction or at least an authorization to perform the prohibited act."[34] Prior to the enactment of the current *Competition Act*, judges employed leeway language such as "unduly" to shield provincially regulated conduct from the criminal conspiracy provisions of competition law. Currently, the RCD is included in the *Competition Act* as an affirmative defence to a prosecution for conspiracy, agreement or arrangement to fix prices.[35]

Regulated conduct has widespread and far-reaching consequences in Canada. For example, one of the seminal cases to affirm the existence and expand the scope of the RCD to conduct that is not only specifically but also generally authorized by provincial law was a case involving the Law Society of British Columbia.[36] In *Jabour v. Law Society of British Columbia*, a lawyer admitted to practice in B.C. was disciplined by the Law Society for "conduct unbecoming" a solicitor. The lawyer had advertised his practice in a manner geared towards middle-income families, with a general notice of sample fees on routine legal tasks such as drafting a will or incorporating a company. This manner of advertising was contrary to the Law Society's regulations at the time, which provided it with a broad mandate to control many aspects of the legal profession, including advertising. For example, section 1 of the *Legal Professions Act* (the authority under which the Benchers (Law Society) were acting when they disciplined Jabour) defined "conduct unbecoming a member of the society" as:

32 *Combines Investigation Act*, R.S.C. 1970, c. C-23 which evolved into the current *Competition Act*, RSC 1985, c C-34.

33 *R. v. Aetna Insurance Co.* [1978] 1 S.C.R. 731.

34 *R. v. Independent Order of Foresters*, 32 O.A.C. 278.

35 *Competition Act*, s. 45(7).

36 *Jabour v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, also cited as: Canada (Attorney General) v. *Law Society of British Columbia*, [1982] 2 S.C.R. 307.

> Any matter, conduct, or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the legal profession.[37]

The Supreme Court in *Jabour* found that the conspiracy provision of the *Combines Investigation Act* did not apply to the B.C. Law Society in the circumstances of the case as the disciplinary measures taken were within the regulatory conduct authorized by provincial law. The case highlights a core problem with the regulatory environment in Canada as it applies to SROs. In cases where an SRO has a mandate with broad discretion to regulate in the interest of the public or of the profession, the application of the RCD can potentially provide it with carte blanche to enact rules that restrict competition.

The *Jabour* case is an example where advertising was substantially curtailed by rules ostensibly used to protect the reputation of legal professionals. While the rules of the provincial law societies have evolved to allow greater competition in advertising since *Jabour*, many questionable restrictions remain. There are also a large number of decisions made in provincially regulated sectors, such as dairy farming or alcohol marketing and retail that restrict competition without any recourse by the private sector.

The RCD creates a legal environment that enables certain SROs to exercise their authority under broad mandates with substantially less risk of running into conflict with competition law. As illustrated in *Jabour*, such mandates can be used to restrict competition under the guise of regulatory necessity. The effect of the RCD is to shift the risk of competition law compliance on non-regulated sectors of the economy, encouraging the rise of SROs as a form of economic protectionism.

## Information Asymmetries in Financial and Auditing Services

Professionals with specialized knowledge have an interest in maintaining or even perpetuating the information imbalance that exists between them and the consumers they serve. The reason for this is simple: most professionals earn their living by selling some variety of "information products." These products are governed by the harsh realities of information commodity markets, as explained by Google's chief economist Hal Varian:

> In a free market, once several companies have sunk the costs necessary to create an undifferentiated product, competitive forces will usually move the product's price toward its marginal cost – the cost of manufacturing an additional copy. And because the marginal cost of reproducing information tends to be very low, the price of an information product, if left to the marketplace, will tend to be low as well. What makes information products economically attractive – their low reproduction cost – also makes them economically dangerous. (Varian 2000, p.134.)

We have all heard the saying that talk is cheap. In the world of professional advisory services, at least, advice can be even cheaper, especially if the same knowledge benefits a large number of people. As Varian notes, however, the attractiveness of information products for consumers also makes them dangerous to professionals, whose earning potential depends on their ability to bridge an information gap. As the information gap shrinks or is closed entirely, professionals' earning potential declines. Therefore, while many professionals have a duty (whether legal or moral) to educate the public and to promote better understanding of issues within the scope of their expertise, professionals always have an incentive to maintain, or in some

37 *Ibid.*

cases even perpetuate, information gaps between themselves and their clients.

In the case of the accounting profession, which in Canada has merged and unified previously differentiated professionals into a single Chartered Professional Accountant designation,[38] a 2003 study by Andrew Green and Roy Hrab of the Institute of Chartered Accountants of Ontario (ICAO), the predecessor organization to the current Chartered Professional Accountants of Ontario (CPAO), found that the role of auditors as intermediaries in financial markets gave rise to an asymmetric information problem in which regulatory rules perpetuate rather than correct informational asymmetries. Green and Hrab found that the ICAO used its powers and existing asymmetries to hinder market mechanisms that limit the impact of self-interested behavior by accountants. In particular, Hrab's study indicated that there are "significant information asymmetries between auditors, retail investors and the public at large" which, according to two surveys of the Canadian Institute of Chartered Accountants (CICA) – now the Chartered Professional Accountants of Canada – "reveal a substantial rift between the public's perception of auditors' roles and responsibilities and auditors' actual responsibilities" (Green and Hrab 2003, p. 64). Green and Hrab concludes that "Self-regulation does not appear to have overcome, and may in fact have exacerbated, the market failure at the core of the arguments for regulation by the profession" (*Ibid.*).

This review of the ICAO and CICA suggests that SROs may develop rules that are primarily designed to enhance monopoly power and serve the interests of a profession or occupation rather than the public. The survey and anecdotal evidence that SRO regimes select regulatory rules that maintain the standing of the profession at the cost of consumer interests is supported by a 2005 study in the *Review of Economic Studies* which found that the "SRO mutes the competition among its members by choosing a more lax enforcement policy than is preferred by customers." (DeMarzo, Fishman and Hagerty 2005).

## Policy Changes in Support of Effective Self-Regulation

The issues with SROs highlighted in this *Commentary* indicate that Canadian governments should be concerned about the potential problems that can arise when statutory powers are delegated to organizations with economic interests that may be in conflict with their fiduciary or ethical duty to regulate in the public interest.

Safeguards should be introduced to prevent a dilution of public accountability and consequential economic harms, including anti-competitive practices by SROs. As discussed in this *Commentary*, the problems that arise with the delegation of statutory powers to SROs can be addressed through the effective use of procedural safeguards within a legislative or contractual framework, coupled with a reliance on substantive rules designed to prevent anti-competitive conduct.

The procedural steps include (i) consultation; (ii) education and publicity; (iii) transparency; (iv) monitoring and accountability. The substantive features of rules are geared towards ensuring that the public interest is served by rules that do not restrain competition more than is necessary to achieve valid regulatory objectives.

In some respects, the principles of minimal restraint regulation have been documented and articulated as part of regulatory policy, for example

38 See framework for uniting the Canadian Accounting Profession. Accessed at: http://unification.cpacanada.ca/a-framework-for-uniting-the-canadian-accounting-profession/

Ontario's Regulatory Policy document states that the development and implementation of regulations by the Ontario government are to be guided by general principles of good regulatory governance, including the principle that regulations should be designed to be least restrictive to trade.[39]

While the principles enunciated in Ontario's Regulatory Policy directive are laudable, they lack the binding force of law and therefore amount to little more than exhortations regarding best practices. In a 2005 study of self-regulation in the UK, Bartle and Vass emphasized that "codification of the principles of good regulatory governance is essential to creating a climate of expectations about regulatory conduct which provides discipline on regulators to operate in the "public interest" (Bartle and Vass 2005). These issues are described in greater detail below in relation to existing statutes, administrative agreements and SRO rules.

### Specific Policy Recommendations

Under the *Delegated Administrative Authorities Act* (DAAA, which has not yet been proclaimed into force) the requirements for delegation are quite general and may not provide adequate checks against dilution of public accountability. The requirement for delegation under DAAA is that the provincial minister enters into an administrative agreement with the authority delegated powers. The DAAA, however, specifies only a minimum of requirements for such agreements which relate to very basic matters such as general governance, liability insurance and disclosure of documents to the minister or various ombudsmen within the government along with requirements for quantitative metrics to measure the delegated authorities' success or failure.[40]

Specific provisions for government oversight and the right to modify aspects of an administrative agreement are limited by section 16 of the DAAA which permits a responsible minister to take action – such as unilateral modification of an agreement, change to the objects of a delegated administrative authority and issuing policy directions, only if certain conditions apply, such as serious harm to public health, safety and the interests of consumers. A high threshold of serious harm to consumer interests – which is at the discretion of the minister – is likely not sufficient to protect against delegated administrative authorities acting in a manner that may not be in the public interest but falling short of the serious harm that warrants government management and oversight. In delegating statutes such as DAAA, specific language should be used that will require provisions in administrative agreements to be minimally restrictive to trade, thereby limiting potentially anti-competitive or other ecnomically damaging conduct.

The administrative agreement between RECO and the Minister of Consumer Services is an example of delegation that could benefit from some of the essential features proposed in this *Commentary*. The RECO agreement contains no provisions on consultation or monitoring by federal competition authorities or non-provincial government consumer advocacy groups.

A chain of delegation weakens accountability by diluting responsibilities for the administration of the *Real Estate Business and Brokers Act, 2002* (REBBA), from the minister down to the chair of the board. While consumer protection and competition is briefly referenced in the preamble and schedule "G" of the agreement, there are no clear processes in place to ensure that consumers are being protected and that decisions do not

39 See Ontario Regulatory Policy. Accessed at http://www.ontariocanada.com/registry/

40 *DAAA*, s. 7(2).

have a detrimental impact on private businesses (and therefore competition) resulting from non-regulatory business decisions made by RECO.

In terms of transparency and accountability, the agreement requires RECO to make its financial information public; however the documents include very high-level, generic reporting such as disclosure of the business plan and an annual report. When it comes to more nuanced aspects of decision-making, such as RECO's role in continuing education of brokers, there is little in the administrative agreement that prevents RECO from exercising its regulatory powers in a manner that is not least restrictive to competition.

The administrative agreement therefore does not adequately address the exercise of discretion and how decision-making proceeds under delegated authority, particularly where an organization such as RECO has an incentive to provide its own continuing education at the loss of third-party suppliers. If such administrative agreements are to be effective, provisions should be in place that prevent delegated administrative authorities from using their regulatory power in ways that restrain trade, reduce competition and/or impact private business and commerce. Such provisions must go beyond general statements in the agreement and should be operationalized within its core provisions.

A system of rules requires monitoring and accountability. The disclosure requirements under DAAA and the province's administrative agreement with RECO are helpful but there needs to be more public input into how SROs are managed and the extent to which consumer interests are protected. RIBO, discussed above, has a governing council that consists of thirteen people, four of whom are members of the public appointed by the province.[41] An expanded version of this model can be used in SROs such that a specific percentage of the governing board and or councils in these organizations is mandated to consist of lay members and that such members would not be chosen by incumbents of the SRO but instead by an independent auditing agency.

Traditional professionals, such as doctors, lawyers and accountants have a more developed body of rules than recent inductees into the realm of self-regulation and delegation. Many rules developed by these associations of professionals should nevertheless be considered in reference to the criteria set forth in this *Commentary* for effective self-regulation. The amendments to the *Competition Act* in 2010 have resulted in price fixing becoming a *per se* offence in Canada, which has arguably made the regulatory environment more challenging for professional associations that routinely exchange information.

Professional associations need to engage in regular consultation with the Competition Bureau on the development of regulatory rules that could lead to maintenance of prices, limits on innovative delivery of service, or other restraints on trade. In terms of enforcement, effective consultation with the Bureau requires a monitoring structure that can ensure regulations are designed in a way that is least restrictive to trade and that regulations fulfill a legitimate public-policy objective.

One method in which consultation, monitoring and accountability can be operationalized is through statutory vetting. The government could do that by reviewing legislation to determine how a current or proposed regulatory regime affects trade and competition and whether certain rules need to be added to protect the public interest or

41 See RIBO summary. Accessed at: http://www.ribo.on.ca/index.php?option=com_content&view=article&id=121&Itemid=103

if other rules that are not minimally restrictive to competition should be eliminated in order to promote competition. Vetting can include consultation with the Competition Bureau and non-governmental consumer advocacy groups and, in the case of delegated authority, a thorough review of administrative agreements and adequate due diligence to ensure that an effective agency (fiduciary) system is in place for certain professions. A system of self-regulation with oversight can be effective in promoting accountability where an SRO's fiduciary obligations are clearly articulated and its organizational structure is designed to incentivize consumer-friendly practices.

The Competition Bureau has provided some guidance on the specific factors that can be used when vetting legislation that creates an SRO. In 2005, the Bureau reviewed Nova Scotia's *Dental Hygienists Act*, providing recommendations on the specific considerations that should be applied to SRO legislation that creates a registration, licensing and disciplinary process as well as standards of practice for members. The then-Commissioner, Sheridan Scott affirmed the principle of 'minimal impairment' to competition which she described as follows:

> The scope of regulatory intervention should be limited to those circumstances in which no equally effective but less costly policy response can be developed, having regard to the need to protect vulnerable clients and third parties. Restrictions on the normal competitive process, such as the right to practice, should be regarded as an extreme regulatory response, justified only by the most compelling circumstances.[42]

Dental hygienists and nurse practitioners are examples of healthcare workers whose increasing role and responsibility in the realm of patient care has the potential to increase competition and inject substantial cost savings into the economy. Similarly, the rise of regulated paralegals in Ontario has created a reasonable substitute for lawyers in simple litigious disputes, debt collection, enforcement and routine drafting matters. Increased division of labour in healthcare and the legal market is a welcome development that can save Canadians money. However, a key long-term consideration is the extent to which the rules creating these newly empowered self-regulated professions can be harnessed for anti-competitive ends.

Governments should take into account a number of specific considerations in vetting legislation that delegates authority. Such legislation should be consistent with the principal of minimal restraint to competition articulated above. These considerations include:[43]

- Reasonable Restrictions: Regulatory rules should address specific, stated problems and include performance standards. If a more general mandate is granted through legislation that either creates a true SRO or delegates legislative enforcement, the ability of an organization to exercise broad discretion needs to be qualified by a firm fiduciary obligation to operate in the public interest;
- Competition Objectives: Unnecessary or overly restrictive regulation can be avoided if an SRO is specifically tasked with promoting competition as one of its primary objectives;
- No Regulatory Offsetting: A regulatory environment should promote a market framework in which all firms thrive or fail on the basis of their ability to meet consumers' demands with the best combination of price and quality;
- Impartiality: The governing body must broadly represent all aspects of the profession being

42 See, Competition Bureau RE: *Dental Hygienists' Act – An Act Respecting the Regulation of the Profession of Dental Hygiene*. Accessed at: chttp://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02035.html

43 *Ibid.*

regulated. No single class of persons should dominate and the perspectives of all members and the general public should play a governance role;

- Transparency: As discussed in past studies of SROs, it is particularly important that independent public membership acts as a counterbalance to professional representation in the SROs management;
- Complaint Handling: In reviewing the delegation of statutory powers, there should be a complaint handling or registration system in place along with independent review of complaint handling decisions; and
- Periodic Assessment: If an organization is delegated statutory powers, there should be mandatory reviews of its performance, particularly with respect to how it handles complaints and its efficacy in serving public-interest objectives.

## CONCLUSIONS

Industries should not be granted self-regulatory powers without some constraints against self-interested and anti-competitive behaviour. As one commentator has noted, "there is sufficient evidence of regulatory failures to indicate that government cannot completely abdicate its responsibilities to self-regulators when a regulatory problem indicates that a government regulatory response is required" (Priest 1998, p. 239).

Canadian governments can enhance oversight by consulting with the Competition Bureau and consumer advocacy groups when administering or surveying self-regulatory powers. Ensuring the public interest is protected also entails the accountability of an SRO (either directly to the public in the case of a self-regulated body constituted by statute, or to government in the case of a body delegated statutory enforcement) and space for public participation in the management framework. If these requirements are met, SROs can better fulfill their responsibility to the public while also ensuring a more competitive marketplace for professional services.

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